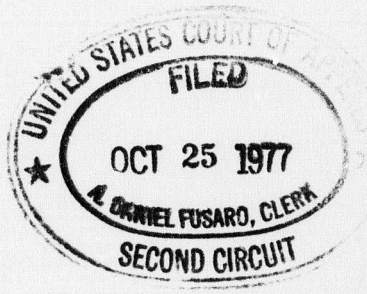
United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7292

United States Court of Appeals
FOR THE SECOND CIRCUIT



GEORGE ARTHUR, et al.,

Plaintiffs-Appellees,

against

EWALD B. NYQUIST, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR EIGHT DEFENDANTS-APPELLANTS, MEMBERS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

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POINT I

Neither The Board of Regents Nor The Commissioner of Education may be Held Responsible for Constitutional Violations Alleged to Have Been Committed by the City Defendants

At Point II of their brief, Appellees argue that the State defendants may be held liable for acts and omissions of the City defendants on a derivative basis on the theory that segregative acts of the Buffalo defendants are attributable to the Regents and Commissioner.

Contrary to Appellees' argument, the Supreme Court of the United States has never upheld such liability on a theory of derivative responsibility. Reliance by Appellees on Milliken v. Bradley, 418 U.S. 3112 (1974), cited at page 32 of their brief, is misplaced. The Supreme Court specifically referred to the issue of derivative liability on an "arguendo" basis and never decided the issue since it reversed the holding of the Circuit Court of Appeals which had upheld an inter-district remedy.

Rizzo v. Goode, 323 U.S. 362 (1976), discussed more fully in the opening brief of Appellants herein at pp. 50-54, suggests that the Supreme Court would reject a theory of derivative

liability for Constitutional violations. In Rizzo, the Supreme Court held that no equitable relief should be ordered against the Mayor of Philadelphia, the City's Managing Director, or supervisory police officials by reason of alleged Constitutional violations by police officers. In so holding, the Supreme Court expressly noted that there was no finding by the District Court of any affirmative link between the incidents of police misconduct and the adoption of any plan or policy by supervisory police officials, the Mayor, or the Managing Director, showing their authorization or approval of such misconduct.

In the instant case, the record is clear that neither the Commissioner of Education nor the Board of Regents approved or authorized any Constitutional violations by the City defendants. On the contrary, the policy of the Board of Regents was to the contrary, and the Commissioner affirmatively attempted to correct desegregation in the Buffalo school system.

Another case in point is the recent U. S. Supreme Court decision in Metropolitan School District v. Buckley, 50 L. Ed. 786 (1977). In Buckley, the Supreme Court vacated the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

and remanded that and related cases to the United States Circuit Court of Appeals for further consideration in light of Village of Arlington Heights v. Metropolitan Housing Development Corporation, 97 S.Ct. 555 (1977) and Washington v. Davis, 426 U. S. 229 (1976). In Buckley, the Circuit Court of Appeals upheld an inter-district remedy involving public schools of the City of Indianapolis, Indiana, and certain schools in Marion County beyond the city limits of Indianapolis. 541 F.2d 1211 (1976). The Circuit Court found a violation by the State of Indiana by reason of the failure of the State General Assembly to include the Indianapolis public school system in legislation which provided for the consolidation of civil governmental units and school districts in all other parts of the state. On this basis, the Circuit Court held that an inter-district remedy should be ordered.

Significantly, the Circuit Court proceeded on the assumption that the state had a Constitutional obligation to remedy segregation in the Indianapolis schools:

> "The General Assembly, under both federal law as expressed in Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and in Green v. County School Board, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968), and Indiana law as expressed in Acts 1949, ch. P.L. 218, § 1; I.C. 1971, 20-8.1-2-1-20-8.1-2-7, had an obligation to alleviate the segregated condition in IPS. The record fails to show any compelling state interest that would have justified the failure to

> include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact. Administrative convenience cannot be a justification for violating the Equal Protection Clause. The district court correctly observed, 'When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [sic] IPS.'" (541 F.2d at pp. 1220-21, emphasis added).

In view of the fact that the United States Supreme Court vacated the judgment of the Circuit Court in light of Washington v. Davis and Arlington, it seems clear that the Court was rejecting the Circuit Court of Appeals' conclusion that the General Assembly had a Constitutional obligation to alleviate segregation within the Indianapolis public school system regardless of motivation or segregative intent. If the Circuit Court of Appeals had been correct in enunciating such a Constitutional duty, its decision would have been affirmed. By reversing, the Supreme Court has reiterated the requirement that a Constitutional violation cannot be found unless the defendant in question had an invidious segregative intent.

The concept of derivative liability -- liability witjout personal fault -- is inconsistent with the burden imposed by the Supreme Court on the plaintiff in a school desegregation to demonstrate that the defendant possesses an actual invidious intent to cause segregation. If Appellees' position were to be sustained, any official or governmental agency which is empowered to take actions which could correct racial imbalance in a school system could be held guilty of Constitutional violations if they failed to act, or, as was the case with the Commissioner in the instant proceeding, were unsuccessful in their attempt to reduce or eliminate segregation. This would include the United States Department of Health, Education and Welfare, the State Legislature, and the Governor, all of whom participate in the allocation of funds for education.

The other cases cited by Appellees do not support their contention. It is not entirely clear that the decision of the Circuit of Appeals in Milliken I* was predicated on a theory of derivative liability. While the Court cited the District Court's finding that "segregative actions and inactions of the Detroit Board of Education previously outlined are the actions of an agency of the State of Michigan," (484 F.2d 238), it did not hold that the State was guilty of segregative acts solely on a derivative basis. Rather, the Court of Appeals cited and upheld specific findings of the

*Bradley v. Milliken, 484 F.2d 215 (6th Cir., 1973)

District Court that the State had committed affirmative violations involving the transportation of students, the unequal expenditure of educational funds, and its rules concerning open enrollment policies (484 F.2d 238-242).

Reed v. Rhodes, 422 F.Supp. 708 (N.D. Ohio, 1976) does not support Appellees' contention that the State defendants should be held derivatively liable for the Constitutional violations of the City defendants. The District Court in Reed determined that the failure of the State to act to correct the acts of segregation on the part of the City of Cleveland established an inference of discriminatory intent under the "foreseeable consequences" test. It should be noted that Reed was decided before, and apparently contrary to Arlington, since the District Court held that a presumption of segregative intent was authorized from the fact of a "foreseeable segregative result." See 422 F.Supp. p. 715.

Nor was Penick v. Columbus Board of Education (U.S.D.C. So. D. Ohio E. Div. March 8, 1977), based upon a theory of derivative liability. The Court held, and we contend incorrectly, that the failure of the State defendants to correct segregation in the Columbus, Ohio school system, with knowledge of the results of such failure, was sufficient

to establish invidious segregative intent.

In summary, we respectfully submit that no determination of Constitutional violations may be made against the Regents or the Commissioner on the basis of derivative liability. Any such determination must be predicated upon an actual invidious intent to segregate by these State defendants.

POINT II

The District Court Used An Improper Standard In Determining Invidious Segregative Intent On The Part of the State Defendants

In our opening brief, we argued that under the decisions of the U. S. Supreme Court, discriminatory impact or the natural and foreseeable consequences of acts or omissions, standing alone, are not sufficient grounds upon which to predicate a conclusion of discriminatory intent. We further urged that the Court below used an incorrect standard in determining that the members of the Board of Regents had committed Constitutional violations, since its conclusion was predicated on the finding that the Commissioner was unsuccessful in his attempts to enforce the Regents' written policy that school segregation shall be eliminated.

Contrary to Appellees' contention at Page 47 of their brief, Appellants herein do not argue that impact or foreseeable consequences are not factors to be considered in determining segregative intent. However, Appellants do argue that plaintiffs' burden of proof cannot be met solely on the basis of the impact or natural and foreseeable consequences of acts or omissions, which, at most, may provide "an important starting point." Village of Arlington Heights v. Metropolitan Housing Corporation,

97 S.Ct. 555 (1977). Judge Curtin used no standard other than impact of foreseeable consequences, in determining the intent of the Regents and Commissioner.

The cases decided by the U. S. Supreme Court since the submission of our opening brief reinforce and add to the position of Appellants herein. These cases also render it clear that each purported Constitutional violation must be examined separately and the correct criteria must be applied to each alleged violation in determining whether or not the same has been caused as a result of invidious intent to segregate.

In School District of Omaha v. U. S., 45 U.S.L.W. 3850 (June 28, 1977), the U. S. Supreme Court vacated a judgment of the Court of Appeals and remanded the matter for reconsideration in light of Arlington,* supra, and Dayton Board of Education v. Brinkman, 45 U.S.L.W. 4910 (June 28, 1977). In Omaha, the Circuit Court of Appeals had held that a presumption of segregative intent arises from actions or omissions whose natural and foreseeable result is to bring about or maintain segregation, and that defendant school district had failed to rebut the burden of proof which had shifted to it. U.S. v. School District of Omaha, 521 F.2d 530 (8th Cir. 1975). The Supreme Court denied Certiorari, 423 U.S. 946 (1976). When the case came up before the Court of Appeals again on the remedy issue, the Court affirmed the system-wide remedy ordered by the District Court.

*In their discussion of Arlington, appellees contend that this

On further appeal, the U. S. Supreme Court noted that neither the Court of Appeals nor the District Court addressed themselves to the inquiry required by Dayton which is to determine how much incremental segregative effect the Constitutional violations had on the racial distribution of the school

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Court's decision in Kennedy Park Homes Association, Inc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970) was approved by the Supreme Court. It is submitted that Appellees have misread the Supreme Court,'s decision in Arlington, where it is stated at Footnote 16:

> "To the extent that the decision in Kennedy Park Homes rested solely on a finding of discriminatory impact, we have indicated our disagreement."
> (50 L. Ed. 2d 466)

The Supreme Court in Arlington cited Kennedy only as an example of an historical pattern which could be considered in determining segregative intent. In this connection, the Court referred to the sequence of events in Kennedy whereby the town declared a moratorium on any subdivisions and re-zoning shortly after learning of plaintiffs' plans to build low-income housing. The inference was that the legislation was intended to prevent integrated housing. No such historical pattern occurred in the instant case with respect to the Board of Regents or the Commissioner.

population as presently constituted, when that distribution is compared to what it would have been in the absence of the Constitutional violations. The remedy must be designed to redress only that difference.

Since the Supreme Court remanded Omaha in light of Arlington, as well as Dayton, it seems clear that the Supreme Court was requiring the lower court to review each of the alleged Constitutional violations, to determine whether or not the plaintiffs had met their burden of proving segregative intent under the criteria set forth in Arlington with respect to each. After the violations are determined, using the proper standard for deciding intent, the Court will be in position to determine the extent of the remedy.

Thus, the opinion of the U. S. Supreme Court in Omaha holds that a presumption of segregative intent cannot be based solely upon the natural and foreseeable consequences test which the Court of Appeals had adopted. If the Supreme Court were not remanding for re-consideration of the intent issue, as well as remedy, there would have been no need for the Court to base its remand on Arlington, which was not concerned with the remedy issue.

As the U. S. Supreme Court stated in Dayton:

> "The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. Washington v. Davis, supra. All parties shouls be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." (45 USLW at p. 4194)

In the instant case, the District Court failed to make the inquiry required under Arlington and Dayton with respect to the Board of Regents or the Commissioner of Education. It is submitted that the Court should have made specific findings concerning intent ot the State defendants with respect tc each purported incident of segregation (transfers, siting, etc.) in order to determine their liability, if any, and the extent to which the State should be involved in the remedy.

A review of the decisions of the court below demonstrates that no findings were made concerning the involvement or participation of the Regents or the Commissioner of Education in any of the specific acts of discrimination involving the Buffalo school system. The specific violations set forth in the Court's opinion of April 30, 1976 are summarized as follows (R 1062 - 1130):

East High School

The Court found that the school board had violated plaintiffs' Constitutional rights through redistricting and transfers. There was no finding or conclusion of discriminatory intent of participation in such acts, by the Regents or the Commissioner. The only mention of any State defendant in this connection, was a comment by the Court that the Commissioner could not deny that he had knowledge that East High School was becoming indentifiably Black in the late 1950's and the early 1960's.

Woodlawn Jr. High

The Court found that the Board of Education had redistricted this school so that it would become a segregated institution. There is no reference to any State defendants' participation in such acts or any finding or conclusion that the State defendants were involved in intentional acts of segregation.

Transfers and Optional Areas

The Court found that the Board of Education had permitted students to attend schools outside of their geographically

assigned institutions in a manner which had a discriminatory effect. There was no discussion, finding, or conclusion concerning any involvement on the part of the State defendants in such acts.

Vocational-Technical High Schools

The Court found that the Board of Education employed selective procedures which screened out minority applicants for these schools. The Court made no finding, conclusion, or even discussed any participation by the State defendants in such acts.

Staff

The Court found that the Board of Education had made assignments of unrepresented minority principals and teachers to Black schools. There was no finding, conclusion, or even any discussion by the Court concerning the State defendants with respect to such acts.

Housing

The Court specifically found that the State defendants had no responsibility for any violation based upon housing in the City of Buffalo. (R. 1188)

Its decision of March 1, 1977, on reconsideration, the Court reviewed the findings it made in its decision of April 1, 1976. (R 1319-22) In doing so, the Court made no mention of the State defendants with respect to the specific incidents of Constitutional violations discussed above. The Court merely restated its

conclusion that the liability of the State defendants was predicated upon their failure to take steps to require the City defendants to comply with the Regents' mandate to integrate.

At Point II of their brief, Appellees further urge that the State defendants should be held responsbile for segregation in the Buffalo school system on two other grounds, neither of which has any support in the record. Appellees contend at page 33 of their brief that the conduct of the State appellants condoned and promoted the segregative acts of the City appellants. There is no evidence in the record to support such an argument. On the contrary, the testimony and exhibits demonstrate an on-going antagonism between the City officials and the State Department of Education as a result of the Commissioner's attempts to require the City to desegregate. Assuming, arguendo, Appellees had met their initial burden of proof, this evidence negates any inference of an actual invidious segregative intent on the part of the State defendants. See Washington v. Davis, 426 U.S. at page 246.

Appellees also contend that the State appellants contributed to segregation in Buffalo by approving the construction and districting of segregated schools, reimbursement of transportation of students for segregatory purposes, and enactment of legislation. All of these contentions are factually incorrect.

Commissioner Nyquist testified, without rebuttal, that the State Department of Education had nothing to do with school site selection.* (R. 777-79) There is no testimony in the record that the State defendants approved the districting of schools in Buffalo, whether they were segregated or integrated.

While the State Legislature, not a party herein, does enact laws which provide for reimbursement for school transportation, there is nothing in the record to indicate that such expenditure of funds was done for discriminatory purposes.

Appellees' contention that the State defendants enacted some kind of discriminatory legislation is preposterous. Neither the Board of Regents nor the Commissioner are empowered to enact legislation.

Since there existed no act or omission on the part of the Regents or the Commissioner other than the fact that the Commissioner tried, but failed, to correct segregation in Buffalo, they cannot be held to have had an intent to segregate.

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*Stipulation 141, cited at P. 46 of Appellees' brief, is simply incorrect and was corrected at trial by Commissioner Nyquist, as indicated above.

POINT III

Housing

At Point Iv of their brief, Appellees contend that segregated housing, purportedly caused by City, State, and Federal action, contributed to segregated schools. There is no contention by Appellees that either the Regents or the Commissioner of Education had anything to do with housing in the City of Buffalo or elsewhere in the State of New York. The decision of the District Court expressly absolved the State defendants from any liability based upon housing practices. (R. 1188).

POINT IV

Members of the Board of Regents Have Been Denied Due Process Having Been Added as Parties-Defendants Without Having an Opportunity to Defend

At Point VI of our opening brief, we pointed out that the individual members of the Board of Regents were not added as defendants to this action until April 30, 1976, the same date that the District Court rendered its substantive decision holding all of the defendants, including the then added members of the Board of Regents, guilty of an invidious intent

to segregate. It was not until after that decision that the individual Regents obtained counsel. Eight of the Regents retained the undersigned to represent them, and seven others retained the New York State Attorney General.

While Appellees correctly argue that their right not to be discriminated against on the ground of color or race is fundamental under the Constitution of the United States, Appellants herein contend that an equally important right is also at issue. This is the right of due process which guarantees a party the right to be notified that charges have been made against him, the right to be heard and the right to defend.

None of these rights were accorded Appellants herein in the proceeding below. It was not until a year and a half after trial that Appellants herein were made parties to this lawsuit, without their knowledge or consent, and were at the same time held to have violated the United States Constitution by engaging in acts of racial discrimination. Thus, fifteen members of the Board of Regents of the State of New York have been tarnished in terms of their reputation and integrity through a procedural ruling which offends one of the basic tenets of the American system of jurisprudence.

At Point VI of their brief, Appellees seek to inject an element of due process to the lower court's decision which added Appellants herein as defendants by referring to that part of the District Court's procedural decision of April 30, 1976, which noted that the attorneys for the State and City defendants indicated that no new offers of evidence would be forthcoming if the motion to add defendants were granted (Appellees' Brief, P. 67). As noted above, Appellants herein were not parties at the time the Attorney General entered into that stipulation and were not represented by the Attorney General or any other counsel at that juncture. No attorneys had appeared for Appellants herein or were authorized to so stipulate.

Due process, contrary to the position enunciated by Appellees, is not a "red herring." A defendant to a lawsuit is entitled to be listed as such by name in a Complaint and to have that Complaint served upon him so that he will know that the charges made therein refer to him, either individually or in his official capacity. Such notice is required under our system of justice whether the issue be one of money, morality, dignity, or, as in the instant case, the integrity and reputation of the defendants.

POINT V

The Remedy

At this juncture of the proceedings, the District Court is still in the process of formulating its remedy order. The Appellants herein have appealed from only that part of the Court's decision concerning remedy which requires them to prepare a scheme which would involve the suburban schools in the remedy plan. Appellees do not argue at this juncture that the District Court was wrong in holding that there is no basis for ordering a metropolitan-wide remedy in view of Milliken I. (R. 1193) However, they do appear to argue that the suburban schools may nevertheless be made to participate in the plan by the State defendants. As we have contended in our opening brief, the dictates of the United States Supreme Court as expressed in Milliken I cannot be subverted through indirect means.

Appellees argue that it may be that suburban schools will be required to participate in the plan in a manner which would not be contrary to Milliken I, although no suggestion is given as to how this might be accomplished..

In any event, the present appeal does not involve the implementation of the plan, but rather the dictates of

the Order, itself.

It is respectfully submitted that the provisions of the District Court's Order requiring the suburban schools to be included in the plan is unconstitutional on its face and should be so declared by this Court.

Dated: October 24, 1977

Respectfully submitted,

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